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No. 88-5986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBOURNE, *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA, FOCUS ON THE FAMILY, FAMILY RESEARCH COUNCIL, NATIONAL COALITION AGAINST PORNOGRAPHY, NATIONAL LEGAL FOUNDATION, ATHLETES FOR KIDS, NATIONAL CHRISTIAN ASSOCIATION AND THE BEREAN LEAGUE, IN SUPPORT OF THE APPELLEE.

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INTEREST OF THE AMICI CURIAE*

Concerned Women for America is a national non-profit organization representing over 600,000 people seeking to preserve traditional Judeo-Christian values and is committed to see the eradication of the exploitation and abuse of children by child pornography.

Focus on the Family is a Christian, non-profit organization, with a nationwide publication and broadcast audience of over two million, which is committed to protecting and strengthening families and children in the United States and throughout the world.

Family Research Council is the Washington, D.C. public policy and research voice for the pro-family movement which seeks to encourage government action and citizen awareness to promote family interests including the eradication of child pornography and child sexual abuse in our country.

National Coalition Against Pornography is a national non-profit organization which seeks to eliminate child pornography and illegal obscenity city by city across the entire United States through building broad coalitions and raising public awareness.

National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms through education and litigation. The Foundation is dedicated to advocacy in support of a proper rendering of the First Amendment's guarantees.

Athletes for Kids is a non-profit organization representing over 100 professional athletes and dozens of corporate leaders nationwide who have joined together with a common purpose of educating young people about the harms of pornography and illicit sex.

National Christian Association is a national non-profit organization, which started Pornography Awareness Week and the National Decency Forum, which seeks to eliminate

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* A complete description of Amici may be found in the appendix. This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

adult and child pornography and thereby reduce child molestation, illicit sex, rape and sexual murders in the United States.

The Berean League based in St. Paul, Minnesota, is a non-profit organization established to maintain a strong, well researched and effective voice to promote the use of Biblical principles in our government and community.

Have a special interest in and knowledge of protecting the physical, emotional, spiritual and psychological health and well being of America's children which will be helpful to the Court in this case.

SUMMARY OF ARGUMENT

The court below upheld the constitutionality of an Ohio statute which criminalized the mere private possession of sexually explicit photographs of children. While fully considering the First Amendment concerns expressed by this Court in decisions on the regulation of pornography, the Ohio Supreme Court highlighted the legal difference between child pornography and obscenity and focused on the varied harms to the children that only possession of child pornography laws can curtail. In addition, the Court determined that requiring proof that a defendant had actual knowledge of the depicted victim's true age is impracticable, and would render most child pornography statutes meaningless if such a scienter standard is required for enforcement.

The landmark case in this area, *Ferber* v. *New York*, 458 U.S. 747 (1982), recognized for the first time the extensive harm done to the child victim from the production and distribution of child pornography. In light of the special harm to children, the *Ferber* court declared that child pornography need not meet the stringent three part test for obscenity. Thus, criminal violations for child pornography now only require a visual depiction of a minor involved in sexually explicit conduct. According to Congress, state legislatures and the courts, laws against child pornography uniquely focus on and are designed to stop the *harm to the victim* rather than the concern about the negative effects on the audience, local community or society as in anti-obscenity legislation.

After child pornography became a separate offense from obscenity, ease of prosecutions and severity of sentences helped change the child pornography industry into an underground network controlled primarily by pedophiles: adults who have a sexual preference for children. In this evolution, production, distribution, consumption and use of child pornography to seduce child victims all became more interrelated with one another and inseparable from the molestation of children.

All facets of this circular chain of child pornography involve serious harms to children although each may cause a different, though related, injury. Consumption and use of child pornography, the final links in the chain, involve special harm to children because child pornography is an essential ingredient to child molestation and its possession and demand fuels the production and distribution market.

In the underground network today, the primary uses of child pornography are: (1) to stimulate pedophiles and child molesters; (2) to lower inhibitions of child victims; (3) to blackmail the child victims into silence; and (4) as a teaching tool for the sexual abuser. Profits from child pornography are often of secondary importance to the network. Moreover, the producer and distributor of child pornography are now often the user and molester in the clandestine, circular, pedophile network, or "cottage industry," where child pornography thrives. Possession laws are necessary to break this circle and stop the child exploitation which occurs at all points in the revolving network.

Scientific research and law enforcement studies further reveal an indisputable link between child pornography and child exploitation as well as the severe harm suffered by children from child pornography. Evidence overwhelmingly supports the conclusion that child pornography primarily exists for use and consumption by pedophiles and child molesters. Removal of all incentive for the production and distribution of child pornography, which is the ability to sell or distribute the pornography to the customer or possessor, is essential to dry up the circular chain of child pornography. Therefore, criminalizing possession of child pornography is paramount to curtail the harm to children, to break the cycle of child sexual victimization and to dry up the market for child pornography.

ARGUMENT

I. CHILD PORNOGRAPHY, WHICH IS CHILD SEXUAL EXPLOITATION IN PICTURES, HARMS CHILDREN BY ITS PRODUCTION, DISTRIBUTION AND CONSUMPTION BECAUSE IT IS A PERMANENT RECORDING OF THEIR SEXUAL ABUSE AND THE SEDUCTION TOOL OF CHOICE FOR THE CHILD MOLESTER

Against a backdrop of growing public indignation over the proliferation of child pornography and its related harms to children, the Court in *Ferber* v. *New York*, 458 U.S. 747 (1982), defined a new category of unprotected speech separate and apart from obscenity. *Ferber* dealt exclusively with child pornography, not obscenity involving only adults, and upheld the New York criminal statute which outlawed the promotion of sexual performances by minors through distribution of *visual depictions of children engaged in sexual activity* which was not legally obscene. *Ferber*, 458 U.S. at 756-765. The reason that this particular type of pornography is given special consideration by the Court is due to the inherent and continuing injury which is increasingly being inflicted upon children by this activity. *Id.* This Court in *Ferber* ruled that the state's "compelling" interest in protecting *child victims* from sexual exploitation through child pornography was of "surpassing importance" to bypass the three part adult obscenity test stated in *Miller* v. *California*, 413 U.S. 515 (1973). *Ferber* 458 U.S. at 757.[1] Hence, the focus of child pornography laws was placed on the child victims and not on the material's negative effects on the audience, community, or the harm to societal values and morals as are the traditional primary concerns of adult obscenity laws.[2]

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[1] The state's interest "in safeguarding the physical and psychological well-being of a minor is compelling" and the value of permitting possession of "photographic reproductions of actual children engaged in lewd, sexual conduct is exceedingly modest if not *de minimis*." *See Ferber*, 459 U.S. at 762.

[2] This Court has found that:

> The sum of experience affords an ample basis . . . to conclude that a sensitive, key relationship of human existence, centered to family life, community welfare, and the development of human personality, can be debased and distorted by crass, commercial exploitation of sex. . . . [The state's interests in obscenity laws] include the interest of the public in the quality of life, the total community environment, the tone of commerce and possibly the public safety itself.

Paris Adult Theatre v. *Slaton*, 413 U.S. 49, 63 (1973)

While the *Ferber* Court did not consider the final stage of the child pornography cycle, i.e., private possession and use, the Court set forth a number of important and legitimate state objectives accomplished by the eradication of child pornography which are instructive in this case.

First, "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic material is harmful to the psychological, emotional and mental health of the child." *State* v. *Meadows*, 28 Ohio St.3d 43, 49 (1986) citing *Ferber* 458 U.S. at 758.

Second, the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways: (1) the materials produced are a permanent record of the children's participation and (2) the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. *Meadows*, 28 Ohio St.3d, at 49 citing *Ferber*, 458 U.S. at 759.

Third, consumption and use of child pornography is a critical link in the chain of sexual exploitation of children because it is essential to the seduction and molestation process. As the Ohio Supreme Court recognized:

> The Court [in *Ferber]* also discerned that state efforts directed at the banning of production would not adequately solve the dilemma. The hidden reality of the child pornography industry makes it difficult, if not impossible to halt the exploitation of children by pursuing only those who produce . . . . In this regard, we note that the *possessor's desire to maintain depictions of child abuse* also *"provide[s] an economic motive for and [is] thus an integral part of the production of such materials*, an activity illegal throughout the Nation." *A flourishing home market for such abusive materials will help guarantee that there will be additional victimization of children.* (Citations Omitted.)

Meadows, 28 Ohio St.3d at 49.

Nineteen states have passed laws outlawing the private possession of child pornography.[3] The constitutionality of such

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[3] Arizona (1983), Minnesota (1983), Nevada (1983), Alabama (1984), Ohio

child pornography possession laws have been upheld by the three state Supreme Courts considering the issue. *State* v. *Meadows*, 503 N.E.2d 697, 28 Ohio St.3d 43 (1986), *cert denied*, 480 U.S. 936 (1987); *Felton* v. *State*, 526 So. 2d 635 (Ala. Crim App 1986), *aff'd*, 526 So.2d 638 (Ala. 1988); and *People* v. *Geever*, 522 N.E.2d 1200, 112 Ill.2d 313 (Ill.), *dismissed for want of jurisdiction*, 102 Led.2d 319 (1988). The rationale and impetus for passing such laws and for upholding the constitutionality of the laws appear to have at least three common threads: first, the overwhelming harm to children caused by consumption and use of child pornography in molestation; second, the realization that production, distribution, possession and use of child pornography are intimately connected and inseparable to the pedophile network; and third, the public's strong desire to dry up the child pornography market.[4]

A. Evidence Clearly Reveals That Child Pornography Is Directly Connected With Child Molestation.

The rapid growth of child pornography[5] reveals a demand for material by people who are stimulated by depictions of sexual activity with children. As one FBI behavioral scientist has said,

> Child pornography exists primarily for the consumption of pedophiles. If there were no pedophiles, there would be little child pornography other than that involving adolescent children.

(1984), Oklahoma (1984), Washington (1984), Florida (1985), Illinois (1985), Texas (1985), Utah (1985), Kansas (1986), Georgia (1987), Idaho (1987), Missouri (1987), South Dakota (1987), Colorado (1988), Nebraska (1988) and West Virginia (1988).

Citizens for Decency Through Law, Inc., *The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney* 170 n. 1 (2d ed. 1988).

[4] See also *United States* v. *Andersson*, 803 F.2d. 903, 907 n.3 (7th Cir. 1986) (court discusses that a State's interest in regulating child pornography "may well extend into the private home.")

[5] A U.S. Senate inquiry concluded that child pornography was a highly organized industry grossing several million dollars per year. S. Rep. 95-438, 2nd Sess. 42 (1978). In recent years more than one million children have been photographed in sexually explicit poses or while engaging in sexual acts with adults or with other children. D. Scott, *Pornography, It's Effect On The Family, Community and Culture* 17 (1985).

K. Lanning, *Child Molesters: A Behavioral Analysis* 18 (2d ed. 1987) [hereinafter *Child Molesters*]. Pedophilia—the predisposition to sexually abuse children, is a real and continuing threat to children.[6]

In a 1983 study by Dr. William Marshall at Kingston Penitentiary, he found 87% of the child molesters of the girls and 77% of the child molesters of boys admitted regular use of pornography. W. Marshall, *Report On The Use Of Pornography by Sexual Offenders; Report to the Federal Department of Justice*, Ottawa, Canada (1983). Pornography was reportedly used for three main purposes:

(1) to stimulate the viewer or child molester;

(2) to destroy the consciences and lower the inhibitions and resistance to sexual activity in their intended child victims; and

(3) as teaching tools for the child to imitate or model in their real life sexual encounter with an adult.

Id.; *See also* W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-offenders*, 25 J. of Sex Research 267-288 (1988).

A recent study of 1400 child sexual exploitation cases reported in Louisville between July 1980 and February 1984 shows that a significant number of molestation cases involve child pornography. *The Effects of Pornography on Children and Women*, Hearings before the Subcommittee of Juvenile Justice, Committee on the Judiciary U.S. Senate (testimony of John Rabun, for the National Center for Missing and Exploited Children, Sept. 12, 1984). Over 40 major cases, involving 12 or more child victims, were studied in depth in Louisville and that research revealed that all 40 involved various forms of adult pornography and in most cases, child nudes and/or child por-

[6] Child Molesters and pedophiles are not synonymous terms. All child molesters are not pedophiles and all pedophiles are not child molesters. A child molester may not have a sexual preference or fantasy for children but may sexually abuse children due to simple availability, to avoid sexually transmitted diseases from adults, curiosity, or a desire to hurt a loved one of the molested child. On the other hand, some pedophiles may not act out their fantasy or preference for having sex with children and thus, not become a child molester. *Child Molester* at 1-3.

nography were found at the molester's premises. *Id.* Clearly, child pornography is directly linked to child sexual abuse and pedophilia.

Child sexual abuse continued to rise with a three fold increase occurring between 1980 and 1986, with 138,000 reported and confirmed cases of child sexual abuse in 1986. *See* National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect* (1988) (NIS-2). However, estimates of actual child sexual abuse greatly exceed 138,000.[7] It is estimated that "one in three females and one in ten males will be sexually molested before the age of 18; and four million child molesters [are believed to] reside in this country." U.S. Department of Justice, Network News 7 (Fall 1985).

According to the Congressional Subcommittee on Child Pornography and Pedophilia "no single characteristic of pedophilia is more pervasive than the obsession with child pornography." U.S. Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, *Child Pornography and Pedophilia*, 99th Cong., 1st Sess. (1988) (Available at the U.S. Government Printing Office, Washington, D.C.) [hereinafter "Subcommittee on Child Pornography"]. Law enforcement studies have verified that pedophiles almost always collect child pornography and child erotica. *Child Molesters* at 17-25. "Detective William Dworin of the Los Angeles Police Department estimates that of the 700 child molesters in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About 80% owned [some type of] pornography." Subcommittee on Child Pornography at 40-60. Child pornography plays a central role in child molestation by pedophiles, serving to justify their conduct, assist them in seducing their victim and provide a

[7] National statistics showed an increase of 400 percent in child sex abuse reports from 1977-1982. In 1984 alone there were 123,000 reported cases, a 35% increase over 1983 and still, says one researcher, we're only touching the "tip of the iceberg." M. Mawyer, *Silent Shame* 27 (1987).

means to blackmail the children they have molested in order to prevent exposure. *Id.*

Even more alarming than the rising statistics of child sexual abuse and its connection to child pornography is what researchers are now referring to as the cycle of child victimization. National Center for Missing and Exploited Children, *Child Pornography and Prostitution* 2-3 (1987) [hereinafter *"Child Pornography"]; Subcommittee on Child Pornography* at 100-101. Most sexually exploited children are seduced into participating in sexual activity with adults. Some are missing children (runaways, throwaways, stranger abductions) who become exploited through prostitution and pornography, and some are relatives or children in the neighborhood of the molester. *Child Molesters* at v-vi. While no accurate studies or statistics are available, it is clear that a significant number of sexually abused children become molesters if not treated early and adequately. According to recent studies, homosexual and heterosexual child molesters average between 30 and 60 child victims respectively before being caught and child molesters will sexually abuse 380 children in their lifetime. G. Abel, *Sexual Aggressive Behavior* (1986). If even some of the 380 children became molesters who in turn sexually abuse 380 children, the exponential increase of sexual exploitation of the children in the second and third generations will be staggering. The Los Angeles Police Department reports that most child molesters (80%) were themselves molested as a child and that they generally seek out victims of the same age and sex of when they were first molested. *Subcommittee on Child Pornography* at 52-53. Scientific research has verified this law enforcement study by finding that 57% of the child molesters studied reported that they were themselves molested as children. Carter, *Use of Pornography In the Criminal and Developmental Histories of Sexual Offenders*, Report to the National Institute of Justice and National Institute of Mental health (1985) (hereinafter "Use of Pornography").

Some pedophiles have organized and become vocal about what they believe is their right to sexual fulfillment. Pedophile organizations such as Rene Gagon Society, whose motto is "Sex by eight or its too late," North American Man-Boy Love Asso-

ciation (NAMBLA) and the groups who met at the International Pedophilic Information Exchange in Wales in 1977, openly advocate laws to permit sex between adults and consenting children, and seek to abolish the minimum age requirement for consenual sexual acts.[8] Final Report of the Attorney General's Commission on Pornography 155 n.592 (M. McManus ed 1986) (hereinafter Commission on Pornography); Child Pornography at 2. With the apparent growth and organization of pedophiles is a concomitant demand for child pornography.

A direct causal link has also been shown through sociological studies to exist between repeated exposure to sexually explicit material involving children and child molestation. *Report of the Surgeon General's Workshop on Pornography and Public Health*, Office of the Surgeon General, U.S. Public Health Service, U.S. Department of Health and Human Services 13 (Aug. 1986) (hereinafter "Surgeon General's Report). In a 1985 study, child molesters were found to use pornography more often than normal adults, were significantly more likely to use these materials prior to and during their offenses, and to employ pornography to relieve an impulse to commit an offense.

A professor of psychology at the University of Utah noted another striking example of the link between child pornography acting as a catalyst for violence,

> Another example of the effects of pornography comes from Gary Bishop, convicted homosexual pedophile who murdered five young boys in Salt Lake City, Utah, in order to conceal his sexual abuse of them. He wrote in a letter after his conviction: "[P]ornography was a determining factor in my downfall. Somehow I became sexually

[8] G. Abel, J. Becker, J. Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 International J. of Law and Psychiatry 96-97 (1984). For child pornography, moreover, issues about a child's capacity to consent are compounded by the exploitative relationship out of which the pornography develops. Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. Crime and Just. 65 (1980). As this Court stated in *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979), "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."

> attracted to young boys and I would fantasize them naked. Certain bookstores offered sex education, photographic or art books which occasionally contained pictures of nude boys. I purchased such books and used them to enhance my masturbatory fantasies. But it wasn't enough. I desired more sexually arousing pictures so I enticed boys into letting me take pictures of them naked. From adult magazines I also located addresses of foreign companies specializing in "kiddie porn" and spent hundreds of dollars on their magazines and films. . . .
>
> Such materials would temporarily satisfy my cravings but soon I would need pictures that were more explicit and revealing. Some of the material I received was shocking and disgusting at first, but it shortly became commonplace and acceptable. As I continued to digress further into my perverted behavior, more stimulation was necessary to maintain the same level of excitement. Finding and procuring sexually arousing materials became an obsession. For me, *seeing pornography was like lighting a fuse on a stick of dynamite. I became stimulated and had to gratify my urges or explode . . . all boys became mere sexual objects*. My conscience was desensitized and my sexual appetite entirely controlled my actions." He then goes on to tell how he sexually abused then killed his boy victims.

V. Kline, *Pornography Effects: Empirical & Clinical Evidence* 15 (1988) (available from the Department of Psychology, University of Utah, Salt Lake City, Utah 84112). (emphasis added)

The fact that a causal connection exists between viewing child pornography and criminal molestation indicates that this viewing activity is not confined to the realm of mere perusal of material, but it frequently enters into the domain of pathological activity mimicking what is perceived. *Commission on Pornography* at 130-131. Whatever the controversy about the nature of the consent of an adult participant in pornography,[9] child pornography at its inception is molestation. Doubtless, the young boy used for the photographs in the possession of the defendant in the instant case suffered substantial harm. The sole purpose of child pornography is to excite and incite adults into further molestation. This conclusion on harm to children is

[9] *See e.g.*, L. Lovelace & M. McGrady, *Ordeal, An Autobiography* (1980).

the fundamental reason why the possession of child pornography should not enjoy First Amendment constitutional protection.

B. Possession And Use Of Child Pornography Involves Substantial Harm To Children.

The initial harm caused to children by consumers of pornography is the use of such materials to lower the inhibitions of children. This portion of the "seduction process" may also involve the use of pornography as an instructional tool, since the molester will ask the child to pose as the performers have depicted, or ask the child to engage in the activities that are depicted. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984). As one investigator detailed,

> It was seduction. It was at their own choosing that they looked at the magazines. Once the pedophile realizes that secret would be kept, the next time the children would visit, they would see another type of magazine, something like *Schoolgirls*, *Lolita* or, again, if you are a boy lover, something like *Piccolo*.
>
> These magazines depict children in the act of sexual molestation, oral copulation, sexual intercourse, sodomy, fondling, and masturbation. When looking at this material, the children appear to be enjoying it. They would be forced into it and. again, the children would look at the magazines or movies, videotapes, photographs of other children, and would question, "Doesn't this hurt, isn't this wrong?"
>
> And the pedophile would demonstrate that it doesn't hurt, that it's a good feeling, a tickling sensation. This is the beginning of the molestation.
>
> The primary purpose of child pornography is to lower the inhibitions of the child, to show the children that other children are engaged in this type of activity, that it's a normal practice, that children should be photographed this way, that there is nothing wrong with it.

Lt. Thomas Rogers, testimony submitted to the Attorney General's Commission on Pornography, Washington, D.C (November 20, 1985) (available at the National Archives in

Washington, D.C.). This seduction technique was also recognized in the Surgeon General's Report at 14:

> Involvement with pornography does seem to have a place in the dynamics of sexually exploited children. Pornography has been used by adults to teach children how to perform sexual acts and to legitimize the children's participation by showing pictures of other children who are "enjoying" the activity. In some cases involvement in the production of pornography has led to other sexual activity; in others, pornography involvement has followed sexual activity.

The cycle of sexual exploitation of children has at its center pornography for enticement, entrapment, and instruction. O'Brien, Child Pornography 1, 89-90 (1983). See Also, *Commission on Pornography* at 138. Pornography is initially shown to the child for "sex education." Various mild forms of pornography, sometimes involving child imagery in adult mens' magazines,[10] is used by the molester to raise the curiosity level of children who are often surprised and bewildered about the sex act. *Id.* The next step in the cycle is to utilize pornography to attempt to convince the child that explicit sex is acceptable, even enjoyable. *Id.* Child pornography is then used to convince the child that other children participate in sexual activity with adults or peers. *Id.* While the child may not comprehend yet that he/she could be personally involved, the seduction process

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[10] An exhaustive study done at American University revealed that from 1954 until 1984, images linking children with sex significantly increased in the more "common" forms of pornography. In all, the research team counted 6,004 images linking children with sex, or an average of 8.2 times in each issue of *Playboy*, 6.4 times in each issue of *Penthouse*, and 14.1 times in each issue of *Hustler*. Received both by juvenile and adult readers, newsstand available child imagery in the context of erotica/pornography increased nearly 2,600% from 1954 to 1984. Nearly two-thirds of the child scenarios were sexual and/or violent; the dominant age bracket was 3-11 years; girls were more prevalent than boys and most likely associated with adult males. Close to 1,000 sexual scenarios included children with adults; 80% of the children were actively involved in all scenes; and each magazine portrayed children as unharmed and/or benefited by adult-child sex. The conclusion of the study was that child/adult sex was portrayed as glamorous, thereby enhancing the impression that these activities are harmless. J. Reisman, *Images of Children Crime and Violence In Playboy, Penthouse and Hustler Magazines*, Executive Summary 8 (1987) (available at the Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice).

is slowly lowering the child's inhibitions and resistance. *Id.* Continued showings of child pornography will lower the natural inhibitions and conscience of the child to a point where touching or kissing of the child may be accomplished by the perpetrator. *Id.* Some of these sessions eventually progress to more explicit sexual activity between the child and the adult or other children using child pornography as instructional aids. *Id.* Finally, still photographs in a "modeling session", home video movies or professional filming occur for blackmail,[11] commercial sale, personal collection of memories, future stimulation, trade with other molesters or use to continue the cycle of abuse with other children.

Another researcher describes the number of uses associated with child pornography to include the following:

> 1. *Blackmail:* Pimps view child pornography as a working tool by which they can acquire new hustlers or extort money from customers through blackmail. A pedophile may use photographs or films of his underage victims to blackmail them into silence. Pornographers also keep negatives and copies of their materials to guarantee the cooperation of exploitive parents;
>
> 2. *Profit:* Many who participate in child pornography do so because it generates wealth. These exploiters may personally have no sexual interest in or enthusiasm for minors;
>
> 3. *Instructional Aids:* An exploitive adult often uses adult and child pornography as an instructional aid to indoctrinate victims into various sexual practices. The exploitive adult also uses the pictures to demonstrate that such behavior is permissible: "If other adults and other children do this sort of thing, then it must be alright;"
>
> 4. *Self Gratification:* Child pornography either sparks or contributes to a heightened state of arousal preparatory to masturbation;

[11] One of the lures used by the adult is to introduce the child into illegal adult activities in addition to the sexual activity. The children would be given cigarettes, beer, liquor, and drugs. The adult would then use this information to threaten the children through betrayal. The adult may threaten to tell the child's parents.

Burgess, Groth, and McCausland, *Child Sex Initiation Rings*, 51 Amer. J. Orthopsychiat. 110, 114 (1981).

> 5. *Conditioning:* The exploitive adult uses kiddie porn to lower a minor's inhibitions and resistance to sex. With proper reinforcement, the victim can be conditioned into a state of acceptance of his or her exploitive situation;
>
> 6. *Advertising:* A procurer often uses pornographic or suggestive pictures of his hustlers to entice customers;
>
> 7. *Collections:* Most hard-core pedophiles possess an extensive collection of adult and child pornography. The value of such merchandise is relative to and depends upon the collector's particular sexual tastes;
>
> 8. *Sexual Record:* Some exploiters use pornographic photographs or films of victims to record their sexual encounters. Visual evidence of sexual accomplishments serves a variety of secondary functions, including blackmail, masturbation, profit, and instructional aid; and
>
> 9. *Access:* The mere possession of child pornography is frequently sufficient to provide an exploiter with access to other offenders and markets. These materials are helpful in terms of profit-making, ordering additional pornography through an exchange, and as a sign of good intentions with fellow exploiters. Simply put, child pornography is the currency of exchange and, in many instances, is the medium of communication among exploiters in the private and public child sex markets.

D. Campagna and D. Poffenberger, *The Sexual Trafficking in Children*, 118 (1988), [hereinafter *"Sexual Trafficking"]*. An additional use of child pornography magazines is as a training manual for finding and seducing children, communicating with other pedophiles, justifying child sex and instructing on how to avoid detection by law enforcement. M. Mawyer, *Silent Shame*, 34-36 (1988).

From a very early age children are taught to respect and believe information contained in books and will thus have the same beliefs about child pornography. *Commission on Pornography* at 150.[12] While a small child may be totally illiterate due to his age or education, a picture can nonetheless communicate a multitude of various ideas and concepts to him.

[12] Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. *Commission on Pornography* at 150, n. 531.

The child pornography problem is not simply going to disappear. That is because the demand remains high, and the supply of potential victims seems inexhaustible as well. *Commission on Pornography* at 135. *Id.* at 200.

Child pornography is also viewed as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors. K. Lanning, *Collectors In Child Pornography and Sex Rings* 86 (A. Burgess ed. 1984). Child pornography, which may have originated as a home-made item, may eventually be sold to a commercial child pornographic publication. *Id.* Much of the commercially produced child pornography is produced in another state (other than the residence of the possessor) or outside the United States; *Subcommittee on Child Pornography* at 4-16, 95-100; R. Lloyd, *For Money or Love: Boy Prostitution in America* 89-90 (1976). This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[13]

The evidence in the instant case suggests that the defendant may have obtained or sold the pornographic photographs of the young boy which he had in his possession through the mail. *Appellee's Motion to Dismiss or Affirm* at 3-4. The underlying implication is that the young boy who was depicted in the photographs was victimized by more people than the individual who shot the photographs. Such visual depictions are nothing more than actual records of child molestation. To stop such victimization, the possessors of such materials must be deterred from the ownership, proliferation and republication of such photographs by the threat of criminal prosecution.

Moreover, to stop the harm associated with possession and use of child pornography, all incentives for other parts of the chain, i.e. production and distribution, must be removed and the deterrent for possession itself must be increased. *Meadows*, 28 Ohio St.3d at 49. Criminal possession laws accomplish

[13] During an investigation in Los Angeles California, police found a mailing list of 5,000 customers of a child pornography distributor. *Commission on Pornography* at 154, n. 586. *See also Sexual Trafficking* at 119-139; *Subcommittee on Child Pornography* at 45-52.

both of these goals and their enforcement will substantially reduce the harms to children which are associated with consumption and use of child pornography.

C. Children Suffer Severe Psychological And Physical Harm From Production And Distribution Of Child Pornography.

(i) Psychological Harms To Children From Production.

Substantial evidence has accrued over the years about the injuries inflicted on children as a result of their participation in the manufacture of pornography.[14] The effects of being a subject in child pornography can be devastating.[15] Children who are used to produce pornography suffer harmful effects similar to those experienced by incest victims. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980). Such effects may include depression, guilt, and psychologically induced somatic disorders. *See e.g.*, R. Lusk and J. Waterman, "Effects of Sexual Abuse of Children," in *Sexual Abuse of Young Children* 101-118 (K. MacFarlane and J. Waterman eds. 1986). These children may grow up to lead a life involving drug abuse and prostitution. Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am J. Orthopsych. 237 (1978). More tragically, children who are sexually abused are more likely when they reach adulthood

[14] The *Ferber* Court explained *inter alia* as follows:

> It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults . . . . [S]exually exploited children [are] predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution . . . . Sexual molestation by adults is often involved in the production of child sexual performances. When such performances are recorded and distributed, the child's privacy interests are also invaded." *Ferber*, 459 U.S. at 758 n. 9. (Citations omitted.)

[15] In western society there is virtual unanimity that early adult/child sexual activity causes harm to the child. *See e.g.*, U.S. Dept. of Health and Human Services, *Child Sexual Abuse: Incest, Assault, Sexual Exploitation* 7 (1981); R. Holmes, *The Sex Offender and the Criminal Justice System* 91-103 (1983).

to victimize young children, particularly their own.[16] In fact, the recidivism rate for pedophile offenders is second only to exhibitionists. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271 (3rd ed. 1980).

One study done on 12 girls between the ages of six through nine who had suffered sexual molestation found an extensive aftermath of psychological trauma which was termed "post-traumatic stress disorder." The various manifestations of this disorder in the young girls was a dissociation from the event, fragmentation of their sense of self, suppression (only able to recall the molestation when provided specific stimuli), "trauma encapsulation" (functional management of one's daily existence while not disclosing the traumatic event), and "compartmentalization" (the event is remembered and in conscious awareness; but it may only be expressed to others in a neutral third person narrative). Burgess, Hartman, Wolbert, and Grant, *Child Molestation: Assessing Impact in Multiple Victims*, 1 Archives of Psychiatric Nursing 33-39 (1987).

Child sexual abuse frequently results in identifiable behavioral changes caused by emotional distress. J. MacDonald, *Rape Offenders and Their Victims* 120-145 (1971); Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law* 684 (R. Slovenko ed. 1965); Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 Psychiatric Q. 100-103 (1956). Yet, even though child physical and sexual abuse often provide fairly observable indicia of the abuse, perhaps fewer than six percent of these cases are reported. Prager, *Sexual Psychopathy and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49, 62 (1982); Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 Dick. L. Rev. 691-719 (1985). One study found that young children fail to speak out about sexual molestation

[16] *See e.g.*, D. Finkelhor, *Child Sexual Abuse: New Theory and Research* 47 (1984); Berliner, Blick, and Buckley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in ABA National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law* (5th ed. 1984); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969).

because they believe they did something wrong to bring about the abuse. S. O'Brien, *Child Abuse: A Crying Shame* 18 (1980).

Child sexual abuse and the production of child pornography are insidious because both prey upon and exploit a child's insecurities. This is an important factor in the area of criminal enforcement of child pornography laws because more often than not the whereabouts of the victim will not be available. As one study noted,

> Some experts on the issue of sexual abuse of boys believe that about 2.5 to 5% of the male population is sexually victimized in childhood or early adolescence. Nationwide, in 1979, there were approximately 22 million boys under age 13. If one uses the base figure of 2.5 to 5% victimization, then current victims would be 550,000 to 1,100,000. And if the rate of new cases is fairly constant, one could expect to see 46,000 to 92,000 new cases of sexual abuse of boys each year. Yet the figures from the National Incidence of Study of Child Abuse and Neglect estimated that in 1979 approximately 7,600 cases of sexually abused boys were known to professionals across the country (only half of these became official reports). *This suggests that as few as one in six or one in twelve boys who are sexually abused come to the attention of a professional.* (Emphasis added.)

S. O'Brien, *Child Pornography* 23 (1983), citing D. Finkelhor, *Children in Crises* 3-4 (1982).[17] The realities of the child pornography production and distribution network are invidious and surreptitious. It is difficult, if not impossible, to ascertain the origin of a great deal of pornographic material. It is equally impossible to locate the photographed child. Therefore, requiring direct scienter of a child's age in a particular photograph to convict a pedophile for possession would emasculate any law enforcement efforts.

(ii) Physical Harms To Children From Production

Many children also suffer physical harm as a result of the premature and inappropriate sexual demands placed on them.

[17] It is estimated that between 600,000 and 1,200,000 children are sexually abused and drawn into the world of child pornography every year, although estimates vary because experts believe that 50 percent or more of the child sex abuse cases are never reported. D. Wildmon, *The Case Against Pornography* 61 (1986).

Child Pornography at 3. Among the physical injuries suffered by children in the production of pornography are sexually transmitted diseases. "[T]he odds of contracting sexually transmitted diseases are very high—particularly because performers do not even have the option of using condoms or other "safe sex" techniques." *Commission on Pornography* at 236. A letter from Oklahomans Against Pornography to the Attorney General's Commission on Pornography put the situation this way,

> How does a three and a half year old girl learn to cope with gonorrhea of the throat and a painful vagina, stretched many times its normal size because her father used her for sexual gratification. This father was another pornography addict.

Commission on Pornography at 209.[18]

Violence and criminal activity are common ingredients in the commercial aspects of child pornography. One producer and distributor was reported to have made five to seven million dollars in his own child pornography business, while other witnesses before Congress described the kidnapping of small children by pornographers, and even their sale by parents. *Sexual Exploitation of Children*, Hrgs. before the Subcomm. on the Judiciary, H. Rep. 95-63, 1st Sess. (1977).

The actual depiction of children in pornography belies the gruesome reality of child molestation. Child psychologist Dr. James Dobson, a commissioner on the 1986 Attorney General's Commission on Pornography, described how his knees buckled and tears came to his eyes as hundreds of photographs were presented to the Commission depicting "pitiful boys and girls with their rectums enlarged to accommodate adult males and their vaginas penetrated with pencils, toothbrushes, and guns." J. Dobson, "Enough is Enough," in *Pornography, A Human Tragedy* 116 (1986).

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[18] Health officials have been alerted for over a decade that infantile gonorrhea is an indicator of sexual assault. S. Sgroi, *Kids With Clap: Gonorrhea as an Indicator of Child Sexual Assault*, 2 Victimology 251-267 (1977); S. Sgroi, *Pediatric Gonorrhea Beyond Infancy*, 8 Pediatric Ann. 5 (1979).

Another author described two films which exemplify both the physical and psychological horror of children exploited for pornographic purposes,

> In a court sentencing in Honolulu, spectators viewed two-eight-minute "kiddie porn" films the defendant was accused of distributing. The first film involved an adult male having sex with a girl about 9 to 11 years old. The action began with the man watching the little girl playing in the park, then swiftly moved to a nude shower scene. From there, it moved to a bedroom, with close-up shots of the girl's hymen intact, then the sex act, followed by shots of the girl's broken and bleeding hymen. The second film, tilted "Lolita Love," depicted an 8-year-old girl having sex with an adult male. It focused on the fear the child experienced as she discovered what she was being directed to do. A woman, thought to be the girl's mother, appeared in subsequent scenes. The girl, obviously taking directions from the two adults, reacted with apparent surprise and fright to an ejaculation scene.

S. O'Brien, *Child Pornography* 28 (1983); *Honolulu Star-Bulletin* A2 (25 March, 1981).

The end-result of pedophiles acting-out pornographic sexual/sadistic depictions of children which they view is death. One series of child pornography photographs shown to the Attorney General's Commission on Pornography "focused on a cute, nine-year old boy who had fallen into the hands of a molester. In the first picture, the blond lad was fully clothed and smiling at the camera. But in the second, he was nude, dead and had a butcher knife protruding from his chest." *Commission on Pornography* at 505. Cases have been reported in which a sex-related murder may have been patterned after a depiction found in a pornographic magazine or film. For example, the *New York Times* reported:

> The December 1984 issue of *Penthouse* carried this eroticized torture into the 'men's entertainment' forum with a series of photographs of Asian women bound with heavy rope, hung from trees, and sectioned into parts. It is not known whether this pictorial incited a crime that occurred two months later wherein an eight year old Chinese girl living in Chapel Hill, North Carolina, was kidnapped, raped, murdered and left hanging from a tree limb.

New York Times (Feb. 4, 1985). Witnesses before the Attorney General Commission on Pornography described the influence they perceived pornography had in their criminal activities or the crimes others had committed:

> The day came when I invited a small neighborhood boy into my apartment, molested him and then killed him in fear of being caught. Over the next few years I kidnapped, sexually abused and murdered four other boys.
>
> Pornography wasn't the only negative influence in may life, but its effect on me was devastating. I lost all sense of decency and respect for humanity and life.

Commission on Pornography at 208. Every week the newspapers carry stories about brutal sex related murders of small children. It is no mystery where many of these killers get their inspiration from.

(iii) Harms To Children From Distribution

Distribution and sale of child pornography harms children in ways which some researchers believe are more severe and long lasting than harm from production.[19] The *Ferber* court noted as follows:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.' Shouvlin, *Preventing the Sexual Exploitation of Children, A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981).
>
> ('[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions'): Note. *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as Use in Pornography) (increases the emotional and psychic harm suffered by the child').

Ferber, 458 U.S. at 759 n. 10.

[19] As one study has commented; "[f]requently a person hiring a child prostitute (or paying a child for sexual acts) will also record the activities. These photographs, tapes, or films are then reproduced and sold, distributed, or exchanged with other adults." National Center on Child Abuse and Neglect, *Sexual Abuse of Children: Selected Readings* at 3-4 (1980) (hereinafter "Child Pornography Study").

Child pornography has a life of its own. The depictions are timeless and may be distributed and circulated for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again. The harm to children from pornography occurs as a result of the existence of the material itself. According to the Commission on Pornography, "the enactment of criminal penalties for the possession of child pornography is essential if these harms outlined in *Ferber*, 458 U.S. at 749, are to be effectively curtailed." *Commission on Pornography* at 150-151.

II. NEUROCHEMICAL EVIDENCE SHOWS THAT PEOPLE REACT DIFFERENTLY TO PICTURES THAN THEY DO TO WORDS RAISING NEW FIRST AMENDMENT CONSIDERATIONS[20]

Visual data, whether good or bad, true or false, appears to be processed as "truth" immediately, forcefully and with some degree of permanence, while competing print/speed is processed feebly, or in some cases not at all.[21] While visual depictions of child exploitation should be treated more harshly than written word because of its harm to the child victim, perhaps the negative and more powerful effect of visual image versus the printed word on the viewer/reader gives additional weight to banning pictorial possession of child pornography.

As was explored above, it is the use of pictures which manipulate and exploit children into participating with an adult in a sexual act. There is a growing body of scientific neurochemical research which shows that pictures are processed and retained by the brain in a different manner than the written word. At least in the context of pictorial child pornography, therefore,

[20] Amici acknowledge and thank Dr. Judith Reisman for her valuable assistance in the development of this concept.

[21] *See* D. Galin, *Educating Both Halves of the Brain*, 53 Childhood Education 17 (1976).

the Court should examine written First Amendment activity in a different light from pictorial activity.

Neurological research has shown that the brain is divided into two halves or hemispheres, the left and right, and each half of the brain performs functions. One half of the brain primarily processes purely congnitive (written) information while the other half primarily processes visual information. As one neurologist explains,

> The two cerebral hemispheres are differently specialized, each performing a variety of tasks of which the other is either incapable or able to accomplish with only marginal facility. The left hemisphere is specialized for language comprehension and execution, verbal memory, and the numerical aspects of calculation, whereas the right hemisphere is specialized for visual-spatial and visual perceptual function, nonverbal memory and comprehension, and execution of speech prosody.

J. Cummings, "Hemispheric Asymmetries in Visual-Perceptual and Visual-Spatial Function," in *Dual Brain: Hemisphere Specialization in Humans* 233 (D. Frank ed. 1985). In general, the left hemisphere is more important for language and motor skills, while the right hemisphere does better with visual and spatial functions. R. Restak, *The Brain* 248 (1984).

Research in the education field also demonstrates that there is substantively different responses by the brain to pictures than to printed words.[22] In much the same manner, advertisers are researching what stimulates the two hemispheres of the brain so that a product will be noticed and remembered. At least one study quite logically suggests that an advertising campaign consisting of both written words and pictures may have the most success. Appel, Weinstein, and Weinstein, *Brain Activity and Recall of TV Advertising*, 19 Journal of Advertising Research 8 (1979).

A mass communication specialist noted: "The printed word no longer has the power it once did . . . the addictive, distortive

[22] L. Harris, "Right-Brain Training: Some Reflections on the Application of Research on Cerebral Hemispheric Specialization to Education," in *Brain Lateralization in Children* 211 (1988).

nature of images are vitally important realities within which to address the issue of freedom of speech." J. Reisman, *Freedom Of Speech as My Theology in Electronic Environment*, 3 New York Review of Law and Social Change, 275-278 (1979). At the very least, it is time to seriously reconsider the 19th century position that words and pictures are to be equated on the same First Amendment plane because they effect people in the same manner. The common-sense reality of the situation (and now a growing body of scientific research) is that they do not, and therefore, different First Amendment protections should be afforded to each. It is no accident that pedophiles revere the picture more than the word. The pictures of molestation stimulate them on a deeper and stronger level, be it neuro-chemical or psychological. The exploitation of a child in a photograph, movie, or video is clear, devastating, and it retains its depraved potency for those that possess and view it.

It is time to stem the tide of this terrible holocaust which claims thousands of innocent children as its victims. Possession of pictorial child pornography cannot be given the same First Amendment protection as written depiction. Intuition follows the old adage that "a picture is worth a thousand words." Unfortunately, a single photograph of a molested child speaks volumes about the tragedy that has befallen that child.

III. CRIMINAL LAWS AGAINST POSSESSION OF CHILD PORNOGRAPHY DO NOT VIOLATE *STANLEY* V. *GEORGIA* AND ARE CRITICAL TO LAW ENFORCEMENT TO ERADICATE CHILD PORNOGRAPHY AND THE CORRESPONDING CHILD MOLESTATION

Stanley v. *Georgia*, 394 US 557 (1969) has been repeatedly raised by criminal defendants as the Supreme Court case which constitutionally prevents passage of laws against possession of child pornography. The Ohio Supreme Court in *Meadows*, 28 Ohio St.3d answered this question persuasively by stating:

> Thus, *Stanley*, has always stood for—and still stands for—the proposition that the state may not, consistent with the First Amendment, regulate the mere private possession of material in one's own home merely because it is obscene. However, it is also significant to our inquiry that Justice

> Marshall cautioned at fn.11 of his majority opinion in *Stanley* that the Court did not '. . . *mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.*' (Emphasis added) *id.* at 568 (Emphasis added). Rather, it was recognized in the *Stanley* opinion that '*there could be cases involving other subjects where . . . compelling reasons may exist for overriding the right of the individual to possess those materials.*' (Emphasis added) *Id.*

Meadows, 28 Ohio St.3d at 46; *See also Felton*, 526 So.2d at 639-640.[23]

The interest which the state of Georgia unsuccessfully asserted in *Stanley*, inter alia, was its right to protect the individual possessor's mind from the effects of obscenity and to prevent future deviant sexual behavior which may be linked to exposure to obscene materials. *Stanley*, 394 U.S. at 565-566. Addressing that point the court in *Meadows* concluded:

> Unlike the obscene material considered in *Stanley*, *Miller*, et al., child pornography involves, by its nature, the physical mental and sexual abuse of, seduction and harmful exploitation of children. *The depictions sought to be banned by the state are but memorializations of cruel mistreatment and unlawful conduct.* Additionally, such material would continue to exploit and victimize the children shown by haunting them in the future. *Ferber* at 759 fn.10. We believe the interest of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, *comprise exactly the type of 'compelling reasons' justifying a 'very limited' First Amendment intrusion envisioned by the Stanley* court. At the same time, the cost to the individual's right to free speech, privacy and thought, caused by the state's banning of visual mementos from an episode of sexual abuse of a child, is slight. Moreover, the

[23] *See* Note, *Child Protection Act of 1984, Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 Okla. City U.L. Rev. 121 (1985), *Stanley* v. *Georgia*, 394 U.S. 557 (1969), would not be a bar to a law prohibiting possession of child pornography).

> content value of such material is trifling and alternative means of stimulation exist."[24]

Meadows, 28 Ohio St.3d at 50, 503 NE.2d at 703 (emphasis added). *See also Felton*, 526 So.2d at 636, aff'd., 526 So.2d at 641; *Geever* 522 NE.2d at 1207.

Unlike *Stanley*, where the Court determined there was no empirical data *at that time* to positively link the private possession of obscenity with deviate sexual behavior or crimes of sexual violence, the private possession of child pornography[25] has clearly been shown to involved direct harm to the children. These direct harms include: (1) harm to the children who produced the original pictures; (2) harm to children from circulation of the material; (3) harm to the children seduced by the child pornography into further molestation; and (4) harm to the children which are then captured again on film for the profit and pleasure of the molester. At that point the molester begins the cycle of child pornography/exploitation anew with his new child victim's pornographic pictures.

Another dissimilarity between *Stanley* and this case was articulated by the Illinois Supreme Court in *People* v. *Geever*,

> The purpose of the statute, unlike that in *Stanley*, is not to limit the individual's freedom of thought and mind in his own home, nor is the purpose to regulate the "moral content" of the depiction described . . . The purpose [of child pornography possession statutes] is to prevent the sexual

[24] In this regard, the *Ferber* majority noted as follows at 762-763: "We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work . . . If it were necessary for literary or artistic value, a person of the statutory age who perhaps looked younger could be utilized. *Meadows*, 280 Ohio St.3d at 50 n9.

[25] The available research relied on by this Court in *Stanley* to conclude that obscenity is not likely to injure either participant or viewer is both seriously questioned in terms of methodology and contradicted by later studies. *See e.g.*, Wilson, "Violence, Pornography, and Social Science," in *The Pornography Controversy* 233-38 (R. Rist.ed. 1975); *Commission on Pornography* at 38-46. Several experts now report a connection between viewing violent obscenity and committing violence on women. *See generally, Pornography and Sexual Agression* (N. Malamuth & E. Donnerstein eds. 1984).

> abuse and exploitation of children by "drying up" the market for child pornography. The incentive for the production and dissemination of child pornography is the ability to sell or distribute the pornography to the ultimate customer or possessor. *In prohibiting without restriction possession of child pornography, the legislature has sought to "dry up" the final and most important link in the chain of distribution of child pornography.*

522 NE.2d at 1206 (emphasis added).

From a law enforcement perspective, possession laws are critical weapons to combat the child pornography network and cycle of child sexual victimization. *Child Pornography* at 10. The Child Protection Act of 1984 and other similar state laws which incorporated *Ferber* successfully curtailed the organized commercial industry of child pornography driving the remains underground. However, the demand continued to increase in the pedophile network as the number of child molesters grew from the cycle of victimization. The "cottage industry" of production and distribution is more difficult to pinpoint and investigate since it is conducted underground through a closed, surreptitious network. The possession and use is now the most visible vestige of the child pornography traffic. Moreover, child testimony against the molester is the normal evidentiary scenario in a child molestation case, and because of this they are extremely difficult cases to win. Trials for possession of child pornography can be easily won with only the pictures and law enforcement testimony. Without possession laws, the molester who is often the producer and distributor will be more free to use child pornography to seduce, molest and take pictures of children engaged in sexually explicit conduct. Moreover, without high risk and deterrent, the demand for child pornography will also rise.

Possession laws are also extremely useful to reduce the trauma which the judicial process places on children who testify in child molestation cases. This is because, as noted above, child pornography is often found in the molester's house. A prosecutor in this type of situation will have the discretion of pursuing two separate causes of action, one of which will not involve the testimony of the sexually abused child. Child pornography speaks for itself to juries and convictions are easily obtained without the use of the abused child's testimony.[26]

As in the drug abuse problem, possession laws against child pornography are critical for law enforcement because they break the cycle of abuse and help reduce demand. *Meadows*, 28 Ohio St. 3d at 54 (Holmes, J. concurring). Child Pornography has several noticeable similarities to contraband drugs, for which possession is an offense. *Id.*

First, when drugs and child pornography are illegally possessed and used, the primary victim is the consumer. The harm to secondary victims, however, is often direct and extensive. In the drug area, the consumer often commits crimes of embezzlement, theft, robbery, assault and murder in order to obtain more money for drugs. The harm to secondary victims from possession of child pornography is even more devastating since they include the molested child seduced into the sexual acts by pornography, the children further traumatized by the pornography's continuous circulation and the children further abused by their participation in the molester's production of child pornography *Meadows*, 28 Ohio St.3d at 54 (Holmes J. concurring). The state correctly punishes everyone in the chain of illegal drugs for the crime of possession and thus, the state should have the power to stop child victimization by banning possession of child pornography, *Id.*

Second, as with the problem of drugs, the purchaser and possessor of child pornography, who pays money for this procured misery, is a vital part of the production-distribution system. Such knowing actions give him equal guilt with the producer and the distributor. Those who purchase or seek out such materials are at the very core of the problem by knowingly creating a demand for the abuse. It is his ultimate enjoyment of the perverse and harmful acts recorded that fuels the entire industry. *Id.*

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[26] See, e.g., Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act (1981), 17 Wake Forest L. Rev. 535; Note, Child Protection Act of 1984, Enforceable Legislation to Prevent Sexual Abuse of Children, 10 Okla. City U. L. Rev. 121 (1985).

Finally, as Justice Holmes recognized in his concurring opinion in *Meadows*:

> Laws banning production and distribution are insufficient to halt the abuse of children. The act of selling these materials is guaranteeing that there will be additional abuse of children. *Ferber, supra* at 761 n. 13. It is not enough to pursue the producers and distributors since most of their activities have been forced underground. *See id.* at 760, n. 11.

Meadows, 280 Ohio St.3d at 55. The *Meadows* court concluded that,

> "the compelling state interests of preserving its children's privacy and protecting them from the cruel physiological, mental and emotional abuse caused by sexual seduction, exploitation and mistreatment occasioned by the [use of] child pornography, outweigh the [possible minimal] interest in possessing such visual depictions"

Meadows, 28 Ohio St.3d at 52.

Amici agree with the *Meadows* Court that it is time to end the horrific plight besetting the children of our nation by upholding the constitutionality of possession laws.

CONCLUSION

The Ohio Supreme Court's decision should be upheld to prevent the victimization and exploitation of children by the possession and use of child pornography stopped.

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APPENDIX

APPENDIX

DESCRIPTION OF AMICI

Concerned Women for America

Concerned Women for America ("CWA") is a national, non-profit membership organization representing approximately 600,000 people. CWA's purpose is as follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. . . .
>
> We are concerned about the increasing availability of pornography and the lack of judicial enforcement of existing laws.
>
> We are concerned about the morally deteriorating condition of the entertainment industry in our country and the increasing emphasis on violent and sexually exploitative programs.
>
> We are concerned about the alarming amount of violence which occurs in American families each year, particularly the high incidence of child, spouse, and elder abuse.
>
> We would like to see the strict enforcement of laws restricting the use and sale of pornography.
>
> We would like to see more education intended to reduce family violence, especially the sexual abuse of children.

Concerned Women for America supports the position of the appellee State of Ohio that possession of child pornography may constitutionally be made a criminal offense. Concerned Women for America urges this Court to adopt the analysis of the Ohio Supreme Court, Jurisdictional Statement at A-6, and uphold the decision of that court.

Focus on the Family

Focus on the Family is a Christian, non-profit organization that is committed to strengthening the emotional, psychologi-

cal and spiritual health of children and their families in the United States and throughout the world. Amicus President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Amicus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book "Pornography, A Human Tragedy" which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amicus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Amicus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

Family Research Council of America

Family Research Council of America, a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance and research for Focus on the Family. Together, their research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly effect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

The National Coalition Against Pornography

The National Coalition Against Pornography (N-CAP) was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With member representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity and child pornography and to implement a number of programs designed to eliminate them from our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; the S.T.O.P.! Campaign (Stand Together Opposing Pornography, an intensive media-based campaign developed by N-CAP to help local communities push for the elimination of illegal obscenity/child pornography through law enforcement); legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representatives and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. N-CAP has also been instrumental in the development of a number of other related groups. N-CAP was the catalyst in the

founding of the Religious Alliance Against Pornography (RAAP) in 1986. RAAP consists of the highest level leadership of nearly fifty denominations, faith groups and inter-faith organizations, all united around the single common objective of eliminating hardcore and child pornography. Members include leaders in the Roman Catholic, Jewish, Protestant, Greek Orthodox and Mormon communities. Dr. Kirk, President of N-CAP, also serves as the Chairman of RAAP.

The fundamental mission and purpose of N-CAP is in protecting children through the elimination of child pornography and obscenity. N-CAP was formed as a result of a group of local citizens and ministers in Cincinnati, Ohio who had seen and counseled firsthand hundreds of families devastated by illegal pornography.

N-CAP has a unique and special interest in the case before the Court. N-CAP is both located and active in the state of Ohio. N-CAP has provided substantial efforts in support of the enforcement of the statute before the Court.

National Legal Foundation

The National Legal Foundation is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights and other inalienable freedoms through education and litigation. The Foundation is dedicated to advocacy in support of a proper rendering of the First Amendment's guarantees.

Athletes For Kids

Athletes For Kids ("AFK") is a non-profit organization started in 1986 in the Commonwealth of Virginia by Brad Curl to address the illicit sex and pornography problem among teenagers with positive, demand reduction solutions. AFK represents over 100 top professional athletes and dozens of leading corporate executives who are concerned about the destructive impact of a ten billion dollar per year pornography industry which exploits women, children and men.

AFK has produced a video to use in school assemblies featuring the athletes and has introduced it in a nine city campaign in the spring of 1989. AFK will be showing the video in hundreds of schools in the coming year and holding leadership meetings in cities coast to coast. AFK's main purposes are to educate young people, train athletes to speak on the destructive effects of pornography and pre-marital sex and to rally city leaders to make a stand against pornography in their communities.

AFK is very concerned that the government does its job in prosecuting obscenity, child pornography and child exploitation and enforcing regulations against indecent broadcasts and telephone services.

AFK believes that the criminal laws against the possession of child pornography will significantly curtail child molestation and related harms which are inflicted upon America's besieged children.

The National Christian Association

The National Christian Association ("NCA") was started by Brad Curl in 1978 to provide leadership and organization to develop local leadership teams in over twenty (20) major cities across the nation to deal with the growing problem of pornography and child exploitation. NCA is especially concerned about the malfunctioning of new generations of children who are unnecessarily exposed to pornography on cable, video, movies, telephone (dial-a-porn and adult party lines) and through magazines. NCA seeks to stop child pornography which exploits and victimizes children in the production, distribution, consumption and use of child pornography.

NCA has worked with local prosecutors to enforce laws against adult bookstores, child pornography distribution and X-rated video distribution. NCA has received complaints about the impact of Dial-A-Porn and X-rated videos in instigating older children to molest younger children. NCA is also concerned about the use of child pornography, soft core and

hard core pornography by pedophiles to reduce inhibitions of children to engage in sexual activity with adults.

NCA started the National Pornography Awareness Week in 1982 and now the Pornography Awareness Week has hundreds of local decency, pro-family and religious organizations participating to stop pornography. The National Decency Forum sponsored by NCA is an annual event which includes over seventy (70) local and national organizations.

NCA is a non-profit national organization based in the Commonwealth of Virginia which has over 10,000 members who are committed to seeing child pornography, child exploitation and adult obscenity eradicating from the United States to preserve our most precious institution, the family, and our most valuable asset, our children.

The Berean League

The Berean League, based in St. Paul, Minnesota, was formed to establish a strong, well researched and effective voice to promote the use of Biblical principles in our government and community. It also fills the need of Christian citizens for concise and credible resources in important moral/social/political issues. The League's authority is scripture. It communicates what the Bible teaches while remaining teachable itself.